

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----X
4 UNITED STATES OF AMERICA, : CR-13-402 (WFK)
5 -against- : United States Courthouse
6 JOHN DOE, : Central Islip, New York
7 Defendant. : November 19, 2013
8 -----X
9 3:00 p.m.

10 (SEALED)
11 TRANSCRIPT OF MOTION HEARING
12 BEFORE THE HONORABLE WILLIAM F. KUNTZ, II
13 UNITED STATES DISTRICT COURT JUDGE

14 APPEARANCES:

15 For the Government: LORETTA E. LYNCH, ESQ.
16 UNITED STATES ATTORNEY
17 BY: AMANDA HECTOR, ESQ.
18 DARREN LAVERNE, ESQ.
19 EVAN NORRIS, ESQ.
20 Assistants United States Attorneys

21 For the Defendant: MAURICE SERCARZ, ESQ.
22 MARION SELTZER, ESQ.

23 Official Court Reporter: Frederick R. Guerino, CSR
24 Ph. (631) 712-6105 100 Federal Plaza - Suite 1180
25 Central Islip, New York 11722

Proceedings recorded by mechanical stenography.
Transcript produced by CAT.

1 THE COURT CLERK: Criminal cause for Curcio
2 hearing, docket number CR-13-402.

3 MS. HECTOR: Amanda Hector for the government,
4 H-e-c-t-o-r, along with Darren Laverne, L-a-v-e-r-n-e and
5 Evan Norris, spelled the typical way.

6 Good afternoon, your Honor.

7 THE COURT: Good afternoon. You may be seated.

8 MR. SERCARZ: Maurice Sercarz.

9 Good afternoon, your Honor.

10 THE COURT: Good afternoon.

11 Any other counsel who wish to state their
12 appearances on the record?

13 MR. NORRIS: Not at this time, your Honor.

14 Amanda will be leading the government on this.

15 THE COURT: Ladies and gentlemen, we are here to
16 conduct a public hearing for an order to close the
17 courtroom during the unnamed defendant's proceeding, and
18 to seal the transcript of and exhibits to the proceeding,
19 and any orders and minute entries associated with the
20 proceeding. Notice of this motion was publically filed on
21 the Docket yesterday morning, 24 hours before this
22 hearing, and includes the time and place of this hearing.

23 I have in my possession three documents relevant
24 to this proceeding. The first is a government's cover
25 letter in connection with the motion to close the

1 courtroom and file documents under seal. Publicly filed
2 on the Docket are November 17 of 2013. The cover letter
3 indicates the hearing is to be conducted today, November
4 19, 2013 at three p.m. The letter also indicates that the
5 sealed motion to close the courtroom and the proposed
6 closure order were provided to defendant's counsel. I
7 have marked this cover letter as Exhibit 1 for
8 identification -- Court Exhibit 1 for identification. The
9 second document is the government's motion to close the
10 courtroom and to file documents under seal, which is dated
11 November 18, 2013.

12 The motion was filed under seal. The motion was
13 provided to the defendant and defendant's counsel. I have
14 marked this motion as Court Exhibit 2 for identification.

15 The third document is the government's proposed
16 order to close the courtroom and file documents under
17 seal, dated November 19, 2013. I have marked that
18 proposed order as Court Exhibit 3 for identification.

19 The public and the press are qualified First
20 Amendment right to access to criminal proceedings;
21 therefore, the power to close the courtroom during such
22 proceedings is one that is seldomly exercised, and even
23 then only with the greatest caution under urgent
24 circumstances, and for very clear and apparent reason.

25 Therefore, before determining whether closure of

1 the courtroom is warranted, the Court must make findings
2 on the record in open court to demonstrate the need for
3 the exclusion of the public and the press.

4 The first issue the Court must determine is
5 whether there exists a substantial probability of
6 prejudice to a compelling interest of the defendant,
7 government or third-party, which closure of the courtroom
8 would resent.

9 Secondly, where a substantial probability of
10 prejudice to a compelling interest is found, the Court
11 must consider whether reasonable alternatives to closure
12 can adequately protect the compelling interest that would
13 be prejudiced by public access.

14 Third, if such alternatives are inadequate to
15 protect the compelling interest, the Court must determine
16 whether the prejudice to the compelling interest overrides
17 the qualified First Amendment right of access.

18 Fourth, and finally, if the Court finds the
19 closure is warranted, the Court must devise a closure
20 order that protects the endangered interest and is
21 narrowly tailored to that purpose.

22 With those standards, the Court will now hear
23 from the parties and public, beginning with the public.

24 Anyone from the public wish to be heard?

25 I hear no public comment.

1 We will now turn to the government and defense
2 counsel and hear your views with respect to this.

3 MS. HECTOR: Your Honor, for the government, I
4 just note that this is a joint motion of the government
5 and defense counsel. And for the reasons set forth in our
6 letter motion the Court referenced, we believe that it is
7 consistent with U.S. v. Alcantera, and that there are
8 adequate reasons to close the courtroom. So we would ask
9 the Court to make such findings on the record and close
10 the courtroom and seal the proceedings, as your Honor
11 indicated prior.

12 THE COURT: I will hear from defense counsel.

13 MR. SERCARZ: Your Honor, we join in that, for
14 the reasons set forth in the government's letter.

15 THE COURT: Upon consideration of the joint
16 motion of the United States of America and the defendant
17 John Doe filed under seal for an order to close the
18 courtroom during the proceedings on November 19, 2013 to
19 continue to use the name John Doe for the defendant's name
20 on the Docket sheet, court calendars, and all documents
21 not filed under seal, and to seal the transcript of the
22 proceedings, any orders entered in connection with the
23 minute entries associated with the proceeding of this
24 order, having scheduled the public hearing on the motion
25 and notified the public of the hearing by listing the

1 date, time and location of the hearing on the public
2 Docket at least 24 hours in advance of this hearing, and
3 the Court's public calendar, and having held the public
4 hearing of the motion at which the parties and any
5 intervenors were provided the opportunity to be heard
6 based on the submissions of the parties, the Court makes
7 the following findings:

8 One. There is a substantial probability that
9 the use of the defendant's name on the Docket sheet, court
10 calendars, and all documents not filed under seal in this
11 matter would prejudice a compelling interest of the
12 government and the integrity of significant government
13 activities entitled to confidentiality, including ongoing
14 investigations of serious crimes;

15 Two. There's a substantial probability of the
16 public receiving the defendant's true name would prejudice
17 the string of significant government activities entitled
18 to confidentiality, including ongoing investigations of
19 serious crimes;

20 Three. No reasonable alternative to closure of
21 the courtroom exists that can adequately protect the
22 compelling interest that would be prejudiced by public
23 proceedings as identified above; and

24 Four. The prejudice to the compelling interest
25 identified above overrides the public and the media's

1 qualified First Amendment right to access these
2 proceedings.

3 Accordingly, pursuant to U.S. v. Alcantara, 396
4 F.3d 189, Second Circuit 2005, and United States v. John
5 Doe, 63 F.3d 121, Second Circuit 1995, it is ordered that
6 the name John Doe continue to be substituted for the
7 defendant's name on the Docket sheet, the courts
8 calendars, and all documents not filed under seal in this
9 matter, and the case be captioned United States v. John
10 Doe.

11 It's further ordered that the motion to close
12 the courtroom during the proceeding and to seal the
13 transcript of the proceedings any orders entered in
14 connection with and minute entries associated with that
15 proceeding and this order hereby granted.

16 It's further ordered that the closure of the
17 courtroom be tailored by requiring the government, with
18 advance notice to the defendant, to disclose the
19 transcript as required by the decision in Brady v.
20 Maryland, 373 US 83 decided in 1963, and 18 U.S.C.,
21 Section 3500 and/or Rule 16 of the Federal Rules of
22 Criminal Procedure.

23 It is further ordered the closure of the
24 courtroom be tailored by requiring the government and the
25 defendant to move this court to unseal the transcript of

1 the proceeding and any orders entered in connection with
2 the proceeding, and to substitute the defendant's true
3 name to John Doe in the caption, when the prejudice to the
4 parties interest no longer outweighs the public's and
5 media's qualified right to access.

6 It is further ordered that the public Docket
7 will immediately be amended to reflect the occurrence of
8 the hearing on the motion to close the courtroom, the
9 disposition of the motion, and the fact of courtroom
10 closure, to be so ordered, dated Brooklyn, New York,
11 November 19, 2013, and entered by this court, Judge
12 William F. Kuntz II, Eastern District of New York.

13 I now invite the public to leave the courtroom
14 and direct superior officers to seal the courtroom.

15 (Pause)

16

17 THE COURT CLERK: We are here for criminal
18 Curcio hearing Docket number 13-CR-402, U.S.A. v. John
19 Doe.

20 Counsel, may you please state your appearances
21 for the record.

22 MS. HECTOR: Amanda Hector, Darren Laverne, and
23 Evan Norris for the government. Thank you.

24 THE COURT: Good afternoon.

25 MR. SERCARZ: For the defendant Maurice Sercarz,

1 S-e-r-c-a-r-z and Marion Seltzer.

2 Good afternoon.

3 THE COURT: And with you today is?

4 MR. REO: Mr. Doe, your Honor.

5 THE COURT: Good afternoon, Mr. Doe.

6 THE DEFENDANT: Good afternoon, Judge.

7 THE COURT: Are there any other counsel who wish
8 to state their appearance for the record?

9 All right. We'll proceed.

10 This hearing was scheduled, Mr. Doe, to advise
11 you of a potential conflict that may arise between you and
12 your attorney, and to advise you that you have a
13 constitutional right to representation by an attorney who
14 has no conflict of interest. These hearings are called
15 Curcio hearings, and the reason for that is they are named
16 after a case decided by the United States Court of Appeals
17 for the Second Circuit, which was called United States v.
18 Curcio, 680 F.2d 881, a Second Circuit case decided in
19 1982.

20 The purpose of this hearing is to make very
21 sure, to make certain that you understand your right to
22 conflict-free counsel. That you understand the potential
23 for conflict, and that you have the opportunity to confer
24 with your attorney and with Ms. Seltzer, the independent
25 attorney appointed by this court, to advise you about some

1 of the potential conflicts that may arise. To make a
2 decision as to whether you want to waive any conflict and
3 proceed with your current counsel, or to retain new
4 counsel, or to have one appointed by the Court, if you
5 cannot afford to hire an attorney on your own. There are
6 many fine attorneys available for the Court to appoint.

7 The Court will be required to and would in fact
8 disqualify a defense counsel who has an actual unwaivable
9 conflict of interest. By that I mean a conflict so severe
10 in nature that no rational person would waive his or her
11 right to conflict-free representation.

12 For example, if your counsel were married to one
13 of the opposing prosecution counsel or to the judge in the
14 case, like that, would not be a waive ability conflict.
15 Where there is, however, only a potential conflict, that
16 is to say, when the interests of the defendant may place
17 the attorney under inconsistent duties at some time in the
18 future, the Court conducts a Curcio hearing to determine
19 whether the defendant will knowingly and intelligently
20 waive his right or her right to conflict-free
21 representation.

22 Do you understand what I have said, sir?

23 THE DEFENDANT: Yes, Judge.

24 THE COURT: Now, sir, how old are you?

25 THE DEFENDANT: I'm 39 years old.

1 THE COURT: Beginning with secondary school,
2 would you briefly describe your educational background.

3 THE DEFENDANT: I went to high school in
4 Trinidad/Tobago. After there, I did my first degree at
5 the University of West Indies in Trinidad. I did that
6 from '92 to '95. I did my first free sociology and
7 manageable studies. I went to College University from
8 August '97 through December '98 where I did my MBA in
9 finance.

10 THE COURT: Would you briefly describe your
11 employment history?

12 THE DEFENDANT: After I graduated in December
13 '98 from public university, I started to work February 1,
14 1999 for Price Waterhouse Cooper in Fairfax, Virginia. I
15 worked there for approximately two and a half years, then
16 I moved to south Florida. I worked for a company called
17 Sentor. It's a management consulting company based in
18 western Florida, a subset of Ft. Lauderdale. I left there
19 in 2002, the middle of 2002, returned to Trinidad, and
20 worked ever since then in the family business from
21 December 2002 till present, with a wonderful company.

22 THE COURT: And the family business, sir, is?

23 THE DEFENDANT: Predominantly real estate,
24 commercial and residential, as well as we own a travel
25 agency. We own a security company, and a hotel.

1 THE COURT: Is the family business conducted in
2 corporate form or partnership form, or doing business as,
3 how is it organized?

4 THE DEFENDANT: Corporate Limited.

5 THE COURT: What is the name of the company?

6 THE DEFENDANT: It is -- the parent name is
7 Warner. W-a-r-n-e-r. The parent company consists of
8 other companies, but the parent company is called Warner,
9 and consists of other companies.

10 THE COURT: Are you an officer, director, or
11 employee of any or all of the companies?

12 THE DEFENDANT: Director of the entire group.

13 THE COURT: Including the parent company?

14 THE DEFENDANT: Yes.

15 THE COURT: Thank you.

16 Now, sir, have you taken any drugs, any
17 medicine, or any pills, or consumed any alcoholic
18 beverages within the past 24 hours?

19 THE DEFENDANT: I had a glass of wine last night
20 at approximately seven p.m.

21 THE COURT: Do you understand what is happening
22 here today?

23 THE DEFENDANT: Yes, I do.

24 THE COURT: I address this question to defense
25 counsel, then to prosecution counsel.

1 Defense counsel, do you have any doubt as to the
2 defendant's competence at this time?

3 MR. SERCARZ: None, Judge.

4 THE COURT: And prosecution, do you?

5 MS. HECTOR: No.

6 THE COURT: The Court hereby finds, based on the
7 record of the defendant's representations, and the
8 representations of all counsel of record, that the
9 defendant is competent.

10 Let me ask the same question to Curcio counsel.

11 Do you have a same view, madam counsel?

12 MS. SELTZER: Yes, Your Honor.

13 THE COURT: You have the same view?

14 MR. SERCARZ: Absolutely.

15 THE COURT: Mr. Doe, I will read the charges set
16 forth in the sealed indictment to which you pled guilty
17 pursuant to a plea agreement on July 15 of 2013, unless
18 you and your counsel waive the reading of that
19 information, of the sealed information.

20 Have you waived a reading of that sealed
21 information?

22 MR. SERCARZ: We do, your Honor.

23 THE COURT: Prosecution waive it as well?

24 MS. HECTOR: Yes, your Honor.

25 THE COURT: Okay.

1 Now, the charges, as you know, are quite
2 serious, and they are felony charges. I will address,
3 Mr. Doe, your right to counsel.

4 The Sixth Amendment of the United States
5 Constitution guarantees every defendant the right to
6 effective assistance of counsel. Your attorney accepted
7 payment for your legal fees from and by your father, who
8 is under investigation by the government. These payments
9 raise ethical questions as to whether your attorney's
10 loyalties are with you, his client or your father the one
11 who is paying the legal fees. This is a conflict of
12 interest that may deny you the defendant, the right to
13 effective assistance of counsel. You, sir, have the right
14 to be represented by an attorney whose only loyalty and
15 only interest is in defending your interests. This court
16 has appointed an attorney to represent you, or would
17 appoint an attorney to represent you if you could not
18 afford an attorney, and there are many fine attorneys
19 available for the Court to appoint. I am now going to
20 explain it's potential conflict.

21 I am informed that your father has assisted you
22 in paying the legal fees of your attorney. I am also
23 informed that your father is under investigation by the
24 government. It's possible that any advice your attorney
25 has given you, or may give you in the future with respect

1 to how to proceed in this case, may be influenced by the
2 fact that he has accepted payment of his fee from your
3 father.

4 For example, though you have chosen to pursue
5 cooperation with the government, and indeed have already
6 pled guilty pursuant to a cooperation agreement, it's
7 possible that your attorney may not have been, and still
8 may not be, able to provide you with a completely
9 independent assessment of whether you should pursue
10 cooperation with the government, especially in the event
11 your cooperation requires that you testify or provide
12 other evidence against your own father.

13 There may be other issues, in addition to the
14 ones that I have just described, that can arise in which
15 your attorney's ability to do certain things might be
16 affected by the type of conflict we have just discussed.
17 No one can perceive every possible conflict of interest.

18 Do you, sir, have any questions at all about
19 what I just explained to you?

20 THE DEFENDANT: No, your Honor.

21 THE COURT: Can you tell me, sir, in your own
22 words, what you understand the potential conflict of
23 interest to be?

24 THE DEFENDANT: Your Honor, in my words I
25 believe that the potential conflict of interest could stem

1 from the standpoint that my father, Jack Warner, paid part
2 of my legal fees to my attorney, Mr. Sercarz, and the
3 potential conflict of interest might be that he might have
4 some controlling interest with Mr. Sercarz.

5 THE COURT: Now, you have the right to be
6 represented by an attorney, who does not have any possible
7 conflict of interest in representing you, at all stages of
8 this case, including this stage. If you proceed with your
9 attorney, you will be giving up that right.

10 Do you understand that, sir?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Have you discussed these issues with
13 your attorney?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: Now, you also have the right to
16 consult with independent attorney who can advise you about
17 the possible conflict of interest, and I encourage you to
18 do so.

19 Have you done that?

20 THE DEFENDANT: I already have done this, your
21 Honor.

22 THE COURT: Do you understand that, right?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: What counsel have you consulted
25 with?

1 THE DEFENDANT: Ms. Marion Seltzer.

2 THE COURT: Who is with you here today to your
3 immediate right in this courtroom, correct?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: Now, sir, you are not under any
6 pressure to make any decision about this today. You are
7 entitled, if you wish, to a reasonable period of time to
8 think more about these matters or to consult further with
9 Ms. Seltzer, if you wish to do so, or with any other
10 attorney before you advise this court as to what you wish
11 to do.

12 Does counsel assure this Court that there will
13 be no conflict that could result in lack of effective
14 assistance of counsel or prejudice to the defendant?

15 MR. SERCARZ: Is that addressed to me or
16 independent counsel?

17 THE COURT: To you, sir.

18 MR. SERCARZ: I do, your Honor.

19 THE COURT: Ms. Seltzer, what is your view?

20 MS. SELTZER: Mr. Sercarz is doing a terrific
21 job, and there's no reason to find that there's a conflict
22 of interest.

23 THE COURT: Now, regarding independent counsel,
24 Mr. Doe, as I previously mentioned, you have the right to
25 consult with your independent counsel.

1 I believe you have consulted with her; is that
2 correct?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: And in the course of that, without
5 invading what you talked about in particular, you had the
6 right to discuss with her possible conflicts of interest
7 that might arise if you were to proceed with your current
8 counsel. I requested that Ms. Seltzer attend the
9 proceeding today, and she has done so, to advise you if
10 you so desire, and she is seated to your right as we have
11 noted earlier. I would strongly urge you to take as much
12 additional time to consult with Ms. Seltzer, if needed, to
13 discuss the issues we have just discussed.

14 Do you need more time to discuss it with her?

15 THE DEFENDANT: No, your Honor.

16 THE COURT: Have you had an opportunity to
17 discuss it with her today?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: Ms. Seltzer, do you need more time
20 to discuss this with your client?

21 MS. SELTZER: No, Judge.

22 THE COURT: I'm prepared to take an adjournment
23 if you do. Are you sure?

24 MS. SELTZER: I'm sure.

25 THE COURT: Okay.

1 Now, Mr. Doe, have you had a chance to discuss
2 the issues that we have just discussed with your attorney.

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: As well as Ms. Seltzer?

5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: Can you tell me in your own words
7 again what you understand the potential conflicts of
8 interest to be?

9 THE DEFENDANT: I understand the potential
10 conflict of interest to be with my father Jack Warner who
11 paid part of my legal fees, that it might be believed or
12 alleged that he can sway the attorney with my cooperation
13 with the United States Government.

14 THE COURT: Now, as I mentioned before, you have
15 the right to receive effective assistance of counsel, and
16 that means that you have the right to be represented by an
17 attorney who does not have any possible conflict of
18 interest in representing you at all stages of this case,
19 including this stage. If you proceed with your current
20 attorney, as I said before and I will say it again, you
21 will be giving up that right.

22 Do you understand that, sir?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: Sir, do you wish to waive your right
25 to separate counsel now?

1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: And do you wish to waive your right
3 to separate counsel throughout this proceeding.

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: Is there anything further that any
6 counsel wishes to state to the Court today?

7 MR. SERCARZ: No. Thank you, your Honor.

8 MS. SELTZER: No, Judge.

9 MS. HECTOR: No, your Honor.

10 THE COURT: This Court adjourns these
11 proceedings. And this Court finds that the conflict is a
12 waivable conflict, and has in fact been waived on the
13 basis of knowledge on the part of the defendant who has
14 been advised by his own counsel, and who has been advised
15 by distinguished and learned Curcio counsel the nature of
16 the conflict. He understands the nature of the conflict.
17 He's an intelligent, well-educated defendant who has
18 stated the basis of his knowledge, and the Court finds
19 that he is knowledgeably waiving any potential conflict.
20 That is the finding of this Court.

21 This court is adjourned. We will adjourn the
22 proceeding, excluding the time and interest of justice.
23 We need to do that? We have a situation where we don't
24 need to do that.

25 Is there anything else either set of counsel

1 wish to say?

2 MR. SERCARZ: No. Thank you, your Honor.

3 MS. HECTOR: No, your Honor.

4 THE COURT: Thank you.

5 We are adjourned until the next available date.

6 MS. HECTOR: Thank you, your Honor.

7 MR. SERCARZ: Thank you, Your Honor.

8 MS. SELTZER: Thank you, your Honor.

9 MR. NORRIS: Good afternoon, Your Honor.

10 THE COURT: Good afternoon.

11 (The proceedings are concluded.)

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